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PP v. SURBIR GOLE

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
MOHAMED APANDI ALI FCJ
B RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
[CRIMINAL APPEAL NO: 05-315-12-2014(J)]
5 JANUARY 2017

C ***CRIMINAL LAW:*** *Murder – Defence – Provocation – Gradual and accumulated provocation – Whether could amount to grave and sudden provocation – Whether accused lost self control – Whether accused had intention to murder deceased – Penal Code, s. 300, Exception 1 – Whether applicable*

D The respondent ('the accused') was charged and tried at the High Court for murder. The undisputed facts were that the accused had stabbed the deceased, and then slashed his own wrist and neck. The deceased subsequently died as a result of her injuries. The accused, who worked with the deceased, claimed that he was subjected to ill-treatment and mental torture by the deceased, who had been verbally abusing him for a significant E period of time until he finally snapped and lost self-control. The trial judge concluded that from the evidence of the accused, it was clear he had lost control of himself as a result of the cumulative provocation by the deceased; and that the said circumstances of the incident did not show that the accused had the intention to murder the deceased. At the conclusion of the case, the F High Court found that Exception 1 to s. 300 of the Penal Code applied and the accused was consequently convicted of culpable homicide not amounting to murder under para. 304(b) of the Penal Code and sentenced to imprisonment for a period of ten years. The prosecution appealed against the said decision and submitted that the trial judge had erred in finding that the G accused had succeeded on a balance of probabilities to prove his defence of grave and sudden provocation. The Court of Appeal was, however, of the unanimous view that the evidence pointed to cumulative provocation and affirmed the sentence imposed upon the accused by the High Court. The prosecution hence appealed to this court and submitted that the Court of H Appeal had erred in finding that the accused's act in stabbing the deceased and thus causing her death was an act committed as a result of cumulative provocation which qualified as grave and sudden provocation under Exception 1 to s. 300 of the Penal Code.

I **Held (dismissing appeal; affirming order of High Court and Court of Appeal)**
Per Zaharah Ibrahim FCJ delivering the judgment of the court:

(1) To come within Exception 1, the provocation that an accused person is relying on must not only be grave, but must also be so sudden as to cause the accused person to 'lose his self-control', and act in a spontaneous

reaction to the grave provocation. It is the kind of suddenness that, to use the words in the illustrations to Exception 1 to s. 300 in the Penal Code, 'excited' the accused person to 'sudden and violent passion' or to 'violent rage'. (paras 37 & 38)

(2) Given the accused's psychological stress and socio-religious background, and given his claim that his mother was ill in Nepal and that he had been trying to get back his passport from the deceased to return to Nepal, the words "ibu manakah yang telah melahirkan anak seperti kamu ini" constituted grave provocation. SP2, who was at the cashier's counter while the deceased and the accused were at the back portion of the shop in the storeroom, said she had heard the deceased asking the accused 'kenapa you tidak pergi bungkus sekarang berapa jam?' After those words were spoken, SP2 said 'saya tidak dengar apa-apa sebelum saya dengar bunyi jeritan Tan Ai Pin ('si mati')'. This suggested a time lag between those loud words and the screams, which was sufficient time for the provocative words to be spoken. (paras 48 & 55)

(3) SP2's evidence was that the knife used to attack the deceased was a brown handled fruit knife. She had seen it at the back of the shop as it was used to open up boxes. It was reasonable to expect the knife to be in the storeroom itself. The deceased and the accused were both in the storeroom when the attack started. It was also reasonable to conclude that after the utterance of the words which gravely provoked the accused, the accused had picked up the knife and attacked the deceased. The manner in which the accused held the deceased, his hitting of her head against the door, and the multitude of stab/slash wounds inflicted within such a short period of time on various parts of the deceased's body (including her face) were clearly indicative of great rage and loss of self control. (paras 56-58)

(4) The accused's reaction of shock when SP2 caught hold of his hand and his reaction after the stabbing where he had tried to slash his own chin and wrist, showed that the accused must have temporarily lost his self control due to the words uttered by the deceased. The most reasonable conclusion that could be drawn from (a) the nature of the attack on the deceased; (b) the number and locations of the deceased's injuries; (c) the sequence of events and the short period of time within which they took place; (d) the type of weapon used in relation to the location of the incident; and (e) the accused's reaction when SP2 caught his hand and his reaction after that, was that the accused had attacked the deceased whilst deprived of the power of self control as a result of grave and sudden provocation by the deceased. Thus, Exception 1 to s. 300 of the Penal Code applied in this case. (paras 61-63)

A ***Bahasa Malaysia*** *Headnotes*

Responden ('tertuduh') dipertuduh dan dibicarakan di Mahkamah Tinggi atas pertuduhan membunuh. Fakta yang tidak dipertikaikan adalah tertuduh menikam si mati, dan kemudiannya mengelar pergelangan tangan dan lehernya sendiri. Si mati meninggal dunia akibat kecederaan yang
B dialaminya. Tertuduh, yang bekerja dengan si mati, mendakwa bahawa dia dianiaya dan didera dari segi mental oleh si mati, yang mencacinya untuk tempoh yang agak lama sehingga tertuduh hilang kawalan kendirinya. Hakim bicara memutuskan dari keterangan tertuduh bahawa dia hilang kawalan kendirinya akibat provokasi kumulatif oleh si mati; dan keadaan kejadian
C yang berlaku tidak menunjukkan tertuduh mempunyai niat untuk membunuh si mati. Di akhir kes, Mahkamah Tinggi mendapati Pengecualian 1 s. 300 Kanun Keseksaan terpakai dan tertuduh disabitkan atas kesalahan homisid salah yang tidak terjumlah pada membunuh di bawah perenggan 304(b) Kanun Keseksaan dan dijatuhkan hukuman penjara selama sepuluh tahun.
D Pihak pendakwaan merayu terhadap keputusan tersebut dan menghujahkan bahawa hakim bicara terkhilaf apabila mendapati tertuduh berjaya membuktikan pembelaan bangkitan marah besar dan provokasi mengejut atas imbangan kebarangkalian. Walau bagaimanapun Mahkamah Rayuan sebulat suara berpendapat bahawa keterangan menunjukkan terdapat provokasi
E kumulatif dan mengesahkan hukuman yang dijatuhkan ke atas tertuduh oleh Mahkamah Tinggi. Pihak pendakwaan oleh itu merayu ke mahkamah ini dan menghujahkan bahawa Mahkamah Rayuan khilaf dalam memutuskan bahawa tindakan tertuduh menikam si mati dan seterusnya menyebabkan kematiannya adalah tindakan yang dilakukan akibat provokasi kumulatif yang berkelayakan sebagai bangkitan marah besar dan provokasi mengejut di
F bawah Pengecualian 1 s. 300 Kanun Keseksaan.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi dan Mahkamah Rayuan)
Oleh Zaharah Ibrahim HMP menyampaikan penghakiman mahkamah:

G **(1)** Untuk digolongkan dalam maksud Pengecualian 1, provokasi yang dirujuk oleh tertuduh bukan hanya berat, tetapi juga mengejut sehingga menyebabkan tertuduh 'hilang kawalan', dan bertindak secara spontan terhadap provokasi berat itu. Adalah keadaan tiba-tiba yang, untuk menggunakan ilustrasi dalam Pengecualian 1 s. 300 Kanun Keseksaan,
H 'memberangsangkan' tertuduh sehingga mencapai 'keghairahan dan keganasan secara mengejut' atau 'naik berang.'

(2) Mengambil kira tekanan psikologi tertuduh dan latar belakang sosio agama dan dakwaan bahawa ibu tertuduh tidak sihat di Nepal dan bahawa dia mencuba mendapatkan balik pasport daripada si mati supaya
I dia boleh pulang ke Nepal, perkataan-perkataan 'ibu manakah yang telah melahirkan anak seperti kamu ini' menjurus kepada provokasi yang berat. SP2, yang pada ketika itu berada di kaunter juruwang sementara

si mati dan tertuduh berada di bahagian belakang kedai dalam bilik setor, menyatakan bahawa dia terdengar si mati menanyakan tertuduh 'kenapa you tidak pergi bungkus sekarang berapa jam?' Selepas perkataan-perkataan itu disebut, SP2 menyatakan 'saya tidak dengar apa-apa sebelum saya dengar bunyi jeritan Tan Ai Pin ('si mati').' Ini mencadangkan satu susulan masa di antara perkataan-perkataan yang disebut dan jeritan yang berikutnya, iaitu waktu yang memadai untuk perkataan-perkataan provokasi dituturkan.

(3) Keterangan SP2 adalah bahawa pisau yang digunakan untuk menyerang si mati adalah sebilah pisau berwarna perang. SP2 telah melihat pisau tersebut di bahagian belakang kedai kerana ia digunakan untuk membuka kotak-kotak. Adalah munasabah untuk menganggarkan pisau itu berada dalam bilik setor. Si mati dan tertuduh kedua-duanya berada dalam bilik setor apabila serangan bermula. Adalah juga munasabah untuk memutuskan bahawa selepas perkataan-perkataan yang telah memprovokasi tertuduh disebut, tertuduh mengambil pisau itu dan menyerang si mati. Cara tertuduh menyerang si mati, dengan menghentak kepala si mati ke pintu, dan sejumlah besar kesan tetakan/tikaman yang dikenakan atas si mati dalam tempoh masa yang singkat pada beberapa bahagian badan si mati (termasuk mukanya) jelas menunjukkan keberangan besar dan kehilangan kawalan kendiri.

(4) Reaksi tertuduh yang terkejut apabila SP2 memegang tangannya dan reaksinya selepas kejadian tikaman di mana dia cuba menetak dagunya dan pergelangan tangannya sendiri, menunjukkan bahawa tertuduh telah hilang kawalan kendiri akibat perkataan-perkataan yang telah disebut oleh si mati. Kesimpulan paling munasabah yang boleh dibuat adalah (a) sifat penyerangan terhadap si mati; (b) jumlah dan bahagian kecederaan-kecederaan yang dialami si mati; (c) turutan peristiwa dan tempoh masa yang singkat; (d) jenis senjata yang digunakan berhubungan lokasi tempat kejadian itu berlaku; dan (e) reaksi tertuduh apabila SP2 menahan tangannya dan reaksinya selepas itu, adalah bahawa tertuduh menyerang si mati dalam keadaan tanpa kuasa kawalan kendiri akibat provokasi berat dan secara tiba-tiba oleh si mati. Oleh itu, Pengecualian 1 s. 300 Kanun Keseksaan diguna pakai dalam kes ini.

Case(s) referred to:

Che Omar Mohd Akhir v. PP [2007] 3 CLJ 281 FC ***(refd)***
Director of Public Prosecutions v. Camplin [1978] AC 705 ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
Poovammal v. State represented by The Inspector of Police, VK Puram Police Station, Tirunelveli District [2012 (2) Mil (CH) 482] ***(refd)***
R v. Dutton [1979] 21 SASR 356 ***(refd)***
Rikky Purba v. PP [2014] 3 CLJ 607 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78
Evidence Act 1950, s. 105
Penal Code, ss. 300, 304(b)

For the appellant - Mangaiarkarasi Krishnan; DPP
For the respondent - Salim Bashir; M/s Salim Bashir Ruswiza & Co
Watching brief for the family of the deceased - Rachel Chacko

[Editor's note: Appeal from Court of Appeal; Criminal Appeal No: J-05-49-03-2014 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaharah Ibrahim FCJ:

Introduction

[1] The respondent (whom we will refer to as the "accused") was charged and tried at the High Court in Malaya at Johor Bahru on a murder charge.

[2] At the conclusion of the whole case the High Court found that Exception 1 to s. 300 of the Penal Code applied. The accused was consequently convicted of culpable homicide not amounting to murder under para. 304(b) of the Penal Code and sentenced to imprisonment for a period of ten years.

[3] The Public Prosecutor's appeal to the Court of Appeal was dismissed.

[4] The Public Prosecutor appealed to this court against the decision of the Court of Appeal.

The Charge

[5] The original charge ("charge") against the accused was as follows:

> Bahawa kamu pada 6 September 2012, jam lebih kurang 8.20 malam, di Kedai No. 12, Ming Ang Bakery House Sdn Bhd, Jalan Sutera 3, Taman Sentosa, di dalam daerah Johor Bahru, dalam negeri Johor Darul Takzim, telah melakukan bunuh dengan menyebabkan kematian ke atas TAN AI PING (NO. KPT; 840615-01-5658), dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

In The High Court

[6] The facts which are not in dispute are that on the date and at the time and place as stated in the charge, the accused stabbed one Tan Ai Ping, and then slashed his own wrist and neck.

[7] Tan Ai Ping, who was bleeding profusely, became unconscious and was taken to the Johor Specialist Hospital, Johor Bahru. Tan Ai Ping ("deceased") died on 7 September 2012 as a result of her injuries. Her body was taken to Hospital Sultanah Aminah, Johor Bahru, by the police.

[8] A post-mortem examination was conducted at Hospital Sultanah Aminah on the deceased by Dr Khairul Anuar bin Zainun ("SP3"). SP3 concluded that the cause of death was 'stab wound to the chest'.

[9] At the conclusion of the case for the prosecution, the learned trial judge found that the prosecution had proved a *prima facie* case against the accused on the charge against him. He was called to enter on his defence.

[10] The accused gave evidence from the witness stand. His defence was that of grave and sudden provocation.

[11] The accused claimed that the deceased had been verbally abusing him for a significant period of time. He was called 'mad, crazy, stupid, cow and bastard' every day prior to the incident on 6 September 2012 as well as on that day itself.

[12] According to the accused, the verbal abuse on that day by the deceased had really enraged him. He finally snapped and lost his self-control.

[13] The accused testified that he came to Malaysia to look for a job in September 2011. He first worked in a restaurant in Yong Peng in Johor owned by the same owner of Ming Ang Bakery where the stabbing incident took place. He said he paid RM3,000 as agency fees to come to Malaysia.

[14] The accused claimed that his passport was kept by the employer. He had several times requested that his passport be given back to him in order for him to return to Nepal but this was refused. Instead, he was scolded by the deceased, and subjected to ill-treatment and mental torture by the deceased. He was denied leave and had to work from 7am until 9pm daily.

[15] The accused claimed that he did not remember what had happened on the day of the incident. He had no recollection of stabbing the deceased. He could not explain how the deceased's blood was found on the knife and at the scene of the incident. He also could not explain how bloodstains were found on his hand and neck.

[16] The learned trial judge considered the evidence adduced throughout the trial until its conclusion and concluded that from the evidence of the accused it was clear he had lost control of himself as result of the cumulative provocation by the deceased. His Lordship said that the circumstances of the incident did not show that the accused had the intention to murder the deceased.

[17] His Lordship further said that the evidence of SP2 showed that the incident happened in a short span of time, of about 5 minutes. The cause of death, according to SP3, was one stab to the heart. The deceased did not die immediately. For that reason, the learned trial judge concluded that the element of intention to kill did not exist in this case.

[18] The learned trial judge, having found that grave and sudden provocation had been proven, held that Exception 1 to s. 300 of the Penal Code applied. The accused was consequently convicted under para. 304(b) of the Penal Code and sentenced to imprisonment for a period of ten years.

In The Court Of Appeal

[19] The sole ground of appeal by the Public Prosecutor in the Court of Appeal was that the learned trial judge had erred in finding that the accused had succeeded on a balance of probabilities to prove his defence of grave and sudden provocation, the provocation being cumulative in nature.

[20] The Public Prosecutor submitted, citing in particular the Federal Court decision in *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281, that cumulative provocation was not a known element in the defence of grave and sudden provocation to the charge of murder. The Court of Appeal disagreed.

[21] The Court of Appeal held:

> [35] With respect, we disagree with that contention. The statement in the case of *Che Omar (supra)* should be looked *[sic]* in the context of the factual matrix of that case. It will be seen that the basic premise in the above sentence is "In the present case, the only provocation was a suspicion in the mind of the appellant ...". In our view, verbal provocation (as in the instant appeal) may operate where there is cumulative provocation and the immediate provocation represents the straw that breaks the camel's back. This involves a situation where there is a series of provocation where the last insult may appear trivial when viewed in isolation and on its own, but the last insult when viewed against the cumulative provocation bring events to a boiling point. (See *Mat Sawi bin Bahodin v. Public Prosecutor* [1958] 1 MLJ 189; *Public Prosecutor v. Lasakke* [1964] 1 MLJ 56).

[22] The Court of Appeal referred to and followed its own decision in *Rikky Purba v. PP* [2014] 3 CLJ 607, quoting the following passages from the judgment in that case:

> [39] Thus, in considering the question whether the appellant was actually provoked to lose his self-control, the court is entitled to consider the immediate act that caused death as well as all relevant circumstances preceding or surrounding that act. The nature of the alleged provocation, the manner in which the appellant reacted, the time which eloped between the provocation and the appellant's response, previous relations between parties, the sensitivity or otherwise of the appellant are relevant considerations to answering the subjective question on provocation.
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> [40] Another important fact to be noted is that in endeavouring to determine whether there has been "time for this passion to cool off", a court is not required to resort to any mathematical formula or to arrive at any computation of time expressed in minutes or hour. The court must,

however, conduct a careful circumstances *[sic]* of the case before it. In doing so, the court must seek to establish whether at the time of doing the act which caused death the passion of the accused had cooled off.

[23] The Court of Appeal referred to the case of *Poovammal v. State represented by The Inspector of Police, VK Puram Police Station, Tirunelveli District* [2012 (2) Mil (CH) 482] in which the Madras High Court said:

30. Under the English Criminal Law, the provocation must be grave and also sudden. But by way of judicial thinking, the Indian Criminal Law has gone ahead. (*KM Nanavathi v. State Of Maharastra* [AIR 1962 SC 605]). In our system there is the concept of "sustained provocation". It is concerned with the duration of the provocation. There may be incidents/ occurrences, which are such that they may not make the offender suddenly to make his outburst by his overt act. However it may be lingering in his mind for quite sometime, torment continuously and at one point of time erupt, make him lose his self control, make his mind to go astray, the mind may not be under his control/command and results in the offender committing the offence, The sustained provocation/ frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased.

[24] The Court of Appeal then referred to the statement of Lord Morris in *Director of Public Prosecutions v. Camplin* [1978] AC 705 at p. 721 and the statement of Justice Cox in *R. v. Dutton* [1979] 21 SASR 356. Lord Morris and Justice Cox both observed that the actions or reactions by which the accused person is to be judged in relation to a given provocation is that of an ordinary person with the same background and characteristics as the accused person.

[25] The Court of Appeal then made the following findings:

[44] Based on the facts in the evidence, we are of the opinion the respondent stabbed the deceased in the heat of passion unpremeditated and in a temporary loss of self-control caused by the provocation. Prior to the occurrence, the respondent was not armed with any weapon. The brief interval in which the respondent went looking for a weapon was not significant in the circumstances of this instant appeal. At the time of occurrence, the respondent remained deprived of self-control and stabbed the deceased whilst so deprived. Further, there is no independent requirement in law that there be no 'cooling-off period'. The existence opportunity to 'cool-off' between the provocative conduct and the respondent's response does not mean that the defence will fail (see *Moffa v. R* (1977) 138 CLR 601; *R v. Kumar* (2002) 5 VR 193; *Pollock v. R* (2010) 242 CLR 233). However, the 'cooling-off period' can be important consideration in determining whether the respondent's act was caused by the provocative conduct, rather than caused by motives of revenge or punishment. The prosecution did not adduce a shred of evidence from which we could infer that there existed a grudge, hatred or revenge on the part of the respondent.

A [45] We are of the opinion that in the circumstances of this instant appeal, the reaction of the respondent was proportionate with the provocation. The fact that there were 43 injuries found on the deceased did not affect the matter adversely to the respondent because a reaction to provocation necessary *[sic]* involves lack of ability to exercise restraint or to judge a situation with insight and balance. The fact that the respondent had
B injured himself after the attack revealed that the respondent was deprived the power of self-control. Any reasonable man placed in the situation and circumstances the respondent was placed would have acted as the respondent did ...

[46] As regards the intention of the respondent is concerned, in the light
C of the evidence we alluded to earlier, it was clear that the incident took place in the heat of passion. The respondent was deprived of self-control and there was no premeditation or deliberation on the part of the respondent to stab at the deceased. The weapon used to stab the deceased was not carried by the respondent but picked up from the spot ...

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[26] The Court of Appeal concluded that the learned trial judge did not err when His Lordship reduced the murder charge against the accused to one of culpable homicide not amounting to murder under para. 304(b) of the Penal Code.

E **[27]** The Court of Appeal was "of the unanimous view that the evidence pointed to cumulative provocation". The conviction of the accused on the reduced charge and the sentence imposed upon him by the High Court were affirmed by the Court of Appeal.

Ground Of Appeal In The Federal Court

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[28] Before us, the Public Prosecutor's sole ground of appeal is that the Court of Appeal had erred in finding that the accused's act in stabbing the deceased and thus causing her death was an act committed as a result of cumulative provocation which qualifies as grave and sudden provocation under Exception 1 to s. 300 of the Penal Code.

G

The Law

[29] The learned Deputy Public Prosecutor submitted before us that Exception 1 to s. 300 of the Penal Code must be applied in accordance with, in particular, the decision of the Federal Court in the case of *Che Omar bin*
H *Che Akhir v. PP (supra)*.

[30] In *Che Omar*'s case, the accused's wife left him without his knowledge, and went back to her mother's home in Kuching, Sarawak, taking her daughter with her. The accused looked for her in Kuala Lumpur but could not find her. He claimed to have received two telephone calls, four days
I apart, threatening to kill him if he went to Sarawak. The first telephone call was received about 11 days after the wife left him. The accused went to

Kuching some 18 days later to look for the wife. He could not find her at her kampung. He bought a knife, as he claimed two men were following him. He found the wife later at her mother's stall at the Jalan Satok Sunday Market in Kuching. At the time PW7 was also at the stall. She answered him rudely when he asked why he treated him that way. The accused asked his wife twice about PW7. She replied that he was "my man". That statement was repeated by the wife. The accused then stabbed his wife several times as her answer made him feel "dayus". She died as a result of the stab wounds.

[31] In dealing with the defence of the accused in *Che Omar*'s case, the learned trial judge in that case said:

> Furthermore, this is a case where it is reasonable to say that if there was provocation, this would or could conceivably have emerged or commenced from the time the accused discovered that his wife Maray had surreptitiously left their matrimonial home in Kuala Lumpur for Kuching with their child. It is quite probable that this provocation was further fueled by his suspicion that his wife Maray was perhaps having an affair with another man when he received the threatening telephone calls from Kuching. His subsequent actions, upon his arrival in Kuching on 2,3.96 in conducting what amounted to a stake-out of the stall owned by his mother-in-law at the Satok Sunday Market, were symptomatic of an attempt not merely to locate his wife Maray but also of a desire to confirm and fortify his suspicion of her infidelity. That suspicion appeared to have been further reinforced when he saw his wife with another man Awang Jamaluddin PW7 at the stall and later when his wife told him, in reference to PW7, that he was her man.
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> From the series of events which I have highlighted above, it would seem that the provocation, which the accused alleged to have suffered, was a gradual one, It was not sudden, even if it could be accepted that the accused had eventually become offended on being told by his wife that PW7 was her man, I am of course of the view that such an offensive rebuttal would not have prompted or caused a reasonable man, placed in the position and circumstances the accused was placed, to become so provoked as to lose his self-control thereby causing him to suddenly whip out a knife and stab his wife to death.

[32] On appeal, the Federal Court explained that the determination of whether a given provocation is grave and sudden is made on the evaluation of facts. The court said:

> [22] In the present case, the only provocation was suspicion in the mind of the appellant that the deceased was unfaithful to him when she referred to PW7 as "He is my man". What was found by the learned trial judge was that the provocation was gradual. He was right. To our minds, there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness (as in the case here) a gradual and accumulated provocation

A is not sufficient to constitute a defence under Exception 1 to s. 300 of the PC. The provocative acts of the deceased were not capable of constituting provocation sufficient to reduce the charge of murder to culpable homicide not amounting to murder. Further, the brutal retaliation by the appellant was not proportionate to the provocation. We agree with the learned trial judge that a reasonable man placed in the situation and B circumstances the appellant was placed would not have acted as the appellant did.

[23] We agree with the Court of Appeal that the learned trial judge was correct in his approach on the defence of grave and sudden provocation in line with what had been stated in *Lorensus Tukan, supra*. In our C judgment, the learned trial judge had fully considered the evidence relied on by the appellant on the defence of grave and sudden provocation

[33] In the case of *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162, referred to by the Federal Court in *Che Omar*'s case, Seah SCJ, in delivering the judgment of the Supreme Court, said:

D

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v. State of Maharashtra* AIR 1962 SC 605, 530).

[34] It appears to us that the term "cumulative provocation" used or E referred to in the High Court and the Court of Appeal in this case, and the cases referred to or cited in both courts, was used in relation to a series of provocations each of which is not by itself grave. It is only when all the provocations in the series are accumulated that the sum total of them becomes grave provocation.

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[35] We believe that *Che Omar*'s case has made the legal position clear with regard to cumulative provocation of the nature described in para. 34 above. We ought to be reminded that the defence of "cumulative provocation" does not exist in our criminal law, and therefore we are not persuaded that it is a permissible defence to s. 300 of the Penal Code. Only the defence of grave G and sudden provocation is specifically provided for in Exception 1 to s. 300 in the Penal Code. We are not inclined to agree to any departure from the established law.

[36] We wish to reiterate, however, that provocation to an accused person that is ordinarily and by itself not grave may be grave enough to fall within H Exception 1 to s. 300 when, after all the circumstances of the case before and during that provocation are taken into consideration, it can be concluded that "a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control".

I

[37] To be able to come within Exception 1, the provocation that an accused person is relying on must not only be grave, but must also be so sudden as to cause the accused person to "lose his self-control", and act in spontaneous reaction to the grave provocation.

[38] It is the kind of suddenness that, to use the words in the illustrations to Exception 1 to s. 300 in the Penal Code, "excited" the accused person to "sudden and violent passion" or to "violent rage".

[39] Ultimately, however, whether the provocation is grave and sudden is a question of fact.

Evaluation Of Facts

[40] According to s. 105 of the Evidence Act 1950, the burden of proving that Exception 1 to s. 300 of the Penal Code, that is that the act of stabbing the deceased was precipitated by grave and sudden provocation, is upon the accused. The accused has to prove not only that the provocation was grave but that it came suddenly.

[41] As mentioned above, in his evidence, the accused testified that he had been constantly mistreated by the deceased by the use of harsh and abusive words.

[42] A few days before the date of the incident, according to the accused, the abusive words became worse.

[43] The accused said he was especially under great strain on the day of the incident as he was given different tasks, which confused him, and as a result he was scolded by the deceased in the morning of the day of the incident. However, the accused claimed that he did not remember what was said to him by the deceased. He also claimed to have no recollection of taking the knife and stabbing the deceased or of injuring himself.

[44] SP2's evidence was that the deceased had merely asked the accused, in a loud voice just a few minutes prior to the incident, why he had not packed the food. This happened after the deceased had gone to the toilet, come out of the toilet and washed her hands.

[45] However, in answer to a question by the court, the accused said that when the deceased uttered the words "ibu manakah yang telah melahirkan anak seperti kamu ini", he could not take it as his mother was ill in Nepal. The prosecution did not apply to cross-examine the accused after that answer was given in response to the court's question.

[46] The learned trial judge considered those words to be the "climax" to the series of provocations that the accused had to endure. The Court of Appeal agreed with that finding.

[47] The accused had clearly been under psychological stress especially due to the deceased's constant loud-voiced scolding. That by itself however would not have caused the accused to attack the deceased as he admitted that he was already used to it. Something else must have caused the accused to attack the deceased. That something else must be the words "ibu manakah yang telah melahirkan anak seperti kamu ini", uttered by the deceased.

[48] In our considered view, given the accused's psychological stress and socio-religious background, and given his claim that his mother was ill in Nepal and that he had been trying to get back his passport to return to Nepal, the words "ibu manakah yang telah melahirkan anak seperti kamu ini" constituted grave provocation. In fact, SP4 gave evidence that the accused had expressed to him about the accused's concern about his mother, wife and children who had no one looking after them in Nepal.

[49] We are aware that SP2 gave evidence that she only heard the deceased asking the accused in a loud voice "kenapa you tidak pergi bungkus sekarang jam berapa?" However, SP2 also admitted that she was at the cashier's counter while the deceased and the accused were at the back portion of the shop, in the storeroom. Quite obviously SP2 would not be able to hear the words spoken to the accused by the deceased if not spoken in the deceased's customary loud voice.

[50] A CCTV recording was tendered into court and marked as exh. P26. According to the CCTV recording, at 8.07pm, the accused was still at the cashier's counter with SP2. He was then seen going towards the washing up area. He then went into the storeroom. This was while the deceased was in the toilet. Then the deceased's loud question which SP2 heard. SP2 did not hear anything else. Shortly after, at 8.10pm, by SP2's estimation, came the deceased's screams and the deceased was seen running out at 8.11pm. In other words, merely 3 minutes had elapsed between the time the accused was still at the cashier's counter and the deceased's screams was heard by SP2.

[51] The evidence of SP4 on the images seen on the CCTV was that when the deceased was in the toilet, the accused was seen going to the place for washing hands and "masukkan sesuatu di bahagian belakang badannya". The accused was then seen going towards the storeroom.

[52] No evidence was led as to what was the "sesuatu" that the accused placed at his back, or even if he in fact placed something at his back.

[53] The learned trial judge did not touch on this part of SP4's evidence. Quite obviously, the learned trial judge who had the advantage of viewing the CCTV recording, was satisfied that the accused did not place a knife at his back. We do not have that advantage. Neither did the Court of Appeal.

[54] The Court of Appeal appeared to have concluded that the accused had gone looking for a weapon. However, as can be seen from para. 46 of the Court of Appeal's judgement reproduced above, the Court of Appeal concluded that the knife used to attack the deceased was "picked up from the spot".

[55] If the accused had indeed been looking for a weapon and was waiting in the storeroom for the deceased in order to attack her, he would surely have done so immediately upon the deceased entering the storeroom. Yet, SP2 heard the deceased asking the accused "kenapa you tidak pergi bungkus sekarang jam berapa?" After those words were spoken, SP2 said "saya tidak dengar apa-apa sebelum saya dengar bunyi jeritan Tan Ai Pin". To our minds, this suggested a time lag between those loud words and the screams. Sufficient time, in our view, for the provocative words to be spoken.

[56] SP2's evidence was that the knife used to attack the deceased was a brown-handled fruit knife. She had seen it at the back of the shop. It was used to open up boxes. In our view, it was reasonable to expect the knife to be in the storeroom itself. The deceased and the accused were both in the storeroom when the attack started. It was also reasonable to conclude that after the utterance of the words which gravely provoked the accused, the accused picked up the knife and attacked the deceased.

[57] We took note of SP2's evidence that she saw the accused holding the deceased by her hair with one hand and hitting the deceased's head against the door, while the other hand was stabbing/slashing her. We also took note of the fact that while the fatal wound was the one stab to the chest, the deceased suffered 42 other stab/slash wounds.

[58] In our considered view, the manner in which the accused held the deceased, his hitting of her head against the door, and the multitude of stab/slash wounds inflicted within such a short period of time on various parts of the deceased's body (including her face) are clearly indicative of great rage and loss of self-control.

[59] SP2 testified that when she saw what the accused was doing to the deceased, she caught hold of the accused's hand which was holding the knife, and asked him why he was doing that. SP2 said the accused "begitu terperanjat" when she held his hand.

[60] After the stabbing, it was the deceased who ran out of the shop. The accused, according to SP2, remained at the same spot, still holding the knife. SP2 later saw the accused slash his own chin and wrist. SP4 and the police found him lying down inside the shop near the corridor beside the kitchen.

[61] The accused's reaction of shock when SP2 caught hold of his hand and his reaction after the stabbing, in our view, show that the accused must have temporarily lost his self-control due to the words uttered by the deceased.

[62] In our considered view, the most reasonable conclusion that can be drawn from:

(a) the nature of the attack on the deceased;

(b) the number and locations of the deceased's injuries;

(c) the sequence of events and the short period of time within which they took place;

(d) the type of weapon used in relation to the location of the incident; and

(e) the accused's reaction when SP2 caught his hand and his reaction after that,

is that the accused attacked the deceased whilst deprived of the power of self control as a result of grave and sudden provocation by the deceased.

Decision

[63] Based on our findings as discussed above, we are unanimous in our view that Exception 1 to s. 300 of the Penal Code applies in this case.

[64] We therefore dismiss this appeal and affirm the order of the High Court and Court of Appeal and the sentence passed by the High Court.

[65] This judgment is delivered under s. 78 of the Courts of Judicature Act 1964 as one of the members of the panel has retired.